



S. 852 – Fairness in Asbestos Injury Resolution Act

Calendar No. 131

S. 852 was reported favorably by the Judiciary Committee, with amendments, on June 16, 2005, by a vote of 13-5, with Senators Leahy, Feinstein, and Kohl joining all Republicans in support.

Noteworthy

- The Senate will begin debate on the motion to proceed to S. 852 on Monday, February 6, and a cloture vote on the motion to proceed will occur on Tuesday at 6 p.m.¹
- The purpose of this legislation is to ensure more reliable compensation to victims of asbestos-related injuries than they receive today in a failed tort system.
- Each year, 10,000 victims of asbestos exposure will die of mesothelioma and tens of thousands of victims will suffer from lung conditions that make breathing so difficult that they cannot engage in routine activities of daily life.²
- Due to transaction costs — primarily attorney fees — only 42 cents of every dollar spent on asbestos litigation end up going to victims.³
- These high transaction costs, as well as a flood of claims by persons without any asbestos-related injuries, have caused at least 73 companies to file bankruptcy due to their asbestos-related liabilities.⁴
- The Supreme Court has three times called upon Congress to address this issue, explaining in one case, “the elephantine mass of asbestos cases ... defies customary judicial administration and calls for national legislation.”⁵
- S. 852 addresses this crisis and responds to the Supreme Court’s plea by taking asbestos claims out of the existing tort system and processing them through a federally administered (but privately funded) trust fund that compensates future asbestos claimants on a no-fault basis according to standardized medical criteria and corresponding claims awards.

¹ *Congressional Record*, S695, February 2, 2006 (statement of Majority Leader Bill Frist).

² S. Rept. 109-97, at 13.

³ RAND Institute for Civil Justice, “Asbestos Litigation,” May 2005, at 105, available at http://www.rand.org/pubs/monographs/2005/RAND_MG162.pdf (hereinafter “RAND”). The RAND study found that 31 cents of every dollar go to defense costs, while 27 cents go to plaintiff attorneys.

⁴ S. Rept. 109-97, at 14 (citing RAND, at 109).

⁵ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

Background

The tort system today does not provide reliable compensation to those persons who are actually injured by asbestos exposure. Instead, the court system has been swamped by individuals who are not impaired but who have merely been exposed to asbestos, along with entirely fraudulent claims crafted by unscrupulous attorneys and sham experts.⁶ The main victims of the current regime are the asbestos victims themselves — persons who deserve compensation for their injuries, but who cannot get their claims processed in a timely or reliable manner. Instead, they find themselves competing with the uninjured and unimpaired over increasingly scarce resources, and they find that compensation that should be coming to them is instead being spent on litigation expenses.

The scope of asbestos-related litigation is dramatic. At least 730,000 claimants have sued more than 8,400 defendant companies alleging some kind of injury caused by asbestos exposure — up from “only” 300 defendant companies in 1983.⁷ Approximately \$70 billion has been spent so far on asbestos litigation,⁸ but the majority of that money is not going to injured parties. Instead, only 42 cents on the dollar are going to victims.⁹ Moreover, asbestos plaintiffs face a delay in the courts that is twice the rate of non-asbestos cases.¹⁰ These lawsuits drain resources that could be going to individuals who have legitimate asbestos-related injuries.

This increase in claimants is due to two factors: the increase in claims from unimpaired individuals who have no malignancy or even any current disease, and the prevalence of asbestos litigation-related fraud.

Those who suffer from asbestos-related malignant diseases are in desperate need of help, but they are by no means the typical plaintiff. More than 90 percent of new claims are made by people who do *not* have cancer or mesothelioma (a type of cancer known to be caused by asbestos exposure).¹¹ Indeed, only 3 percent of claims today are for mesothelioma.¹² Thus, not only have the courts been burdened by the sheer volume of cases — legitimate and fraudulent alike — but also they have been unable to ensure that even a majority of asbestos compensation goes to plaintiffs who are actually injured. Indeed, most of these claims are by people *who are not impaired in any way*. The court system has failed to sort out these claims by the unimpaired, so that between 47 and 64 percent of total dollars paid to plaintiffs have gone to persons *without* malignant diseases of any sort.¹³

The second factor driving the increase in claims is fraud. Senators Kyl, Cornyn, and Coburn have documented the prevalence of fraud in asbestos litigation in the committee report.¹⁴ As Tom Donahue, President of the U.S. Chamber of Commerce, wrote to the Attorney General

⁶ S. Rept. 109-97, at 120-135.

⁷ RAND, at 71.

⁸ RAND, at 92 (through 2002).

⁹ RAND, at 105.

¹⁰ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 631 (1997) (Breyer, J., concurring).

¹¹ RAND, at 75.

¹² RAND, at 99.

¹³ RAND, at 99. The range is due to alternative data analyses used by RAND.

¹⁴ S. Rept. 109-97, at 120-135.

last year, the nation faces “considerable evidence ... indicating the existence of substantial and systematic fraud in asbestos litigation.”¹⁵ That fraud infects some of the attorneys who bring the claims, as well as the experts they hire. These Senators argue that “evidence of routine fraud in the creation of asbestos legal claims is now overwhelming,” and they join Mr. Donohue’s call for a federal investigation.¹⁶

While the failure in the tort system hurts asbestos victims foremost, the impact reaches the entire economy. Many defendants are not asbestos sellers or manufacturers but are companies that have but a tangential relationship to the product. These “nontraditional” defendants include companies from nearly every part of our economy — 75 of the 83 industrial sectors, including such peripheral industries as financial services, hotels, telecommunications, and even food and beverage.¹⁷ One study estimates that nontraditional defendants are targets of nearly half of all new asbestos claims, and account for 60 percent of asbestos expenditures.¹⁸ This litigation is a financial drain on the economy, and undermines the productivity of those businesses.

In the worst case scenario, companies have declared bankruptcy. At least 73 companies have filed bankruptcy due to their asbestos-related liabilities, including at least 37 between January 2000 and summer 2004.¹⁹ Those bankrupt companies have facilities in nearly every state.²⁰ Joseph Stiglitz, Nobel Prize winner in Economics, estimates that these bankruptcies have destroyed approximately 60,000 jobs so far, and that each of these dislocated workers suffered raw financial losses of up to \$50,000.²¹ Also affected are those workers’ pensions. Prof. Stiglitz concluded that the average employee of those firms declaring bankruptcy lost more than \$8,000 in pension assets.²² Moreover, when a company declares bankruptcy, the amount of money available to asbestos victims inevitably decreases dramatically. For example, the Johns Mansville bankruptcy trust, which pays asbestos-related claims for one of the first companies driven into bankruptcy due to asbestos claims, delivers just pennies on the dollar, and 63 percent of the bankruptcy trust’s funds go to those with non-malignant conditions.²³

Our civil justice system is ill-equipped to handle this volume of cases, especially when problems are compounded by fraud and manipulation. Defendants, union representatives, insurers, and even the Supreme Court have been calling on Congress to enact a comprehensive legislative solution to this problem.

¹⁵ Letter from Tom Donohue to Alberto Gonzales, quoted in additional views of Senators Kyl, Cornyn, and Coburn in S. Rept. 109-97, at 121-123.

¹⁶ S. Rept. 109-97, at 123.

¹⁷ Joseph Stiglitz et al., “The Impact of Asbestos Liabilities on Workers in Bankrupt Firms” (2002), at 19-20, available at http://www.asbestossolution.org/stiglitz_report.pdf. Dr. Stiglitz is the co-winner of the 2001 Nobel Prize in Economics, and has served as the World Bank’s Chief Economist and the Chairman of the President’s Council of Economic Advisers. The industrial sectors are defined by the Department of Commerce.

¹⁸ RAND, at 77, 94.

¹⁹ RAND, at 109.

²⁰ Stiglitz, at 21.

²¹ Stiglitz, at 26, 43.

²² Stiglitz, at 43.

²³ S. Rept. 109-97, at 18.

Bill Provisions

Overview

S. 852 would establish a privately funded trust fund (the “Fund”) composed of mandatory contributions from current defendants and their insurers as well as monies from existing bankruptcy trusts. Persons who believe they have been injured by asbestos exposure would submit claims to a “Fund Administrator” with evidence that they were exposed to asbestos for a period of time sufficient to cause their medical condition. Qualified claimants would be paid a fixed claim award depending on eligibility and disease type on a no-fault basis. Properly administered, the Fund would ensure that nearly all defendants’ and insurers’ asbestos expenditures end up in the hands of injured claimants. And unlike the tort system, where transaction costs take a majority of available compensation monies, attorney fees would be capped at 5 percent.

Funding the Fund

The Fund would be composed of contributions from defendant companies, their insurers, and existing bankruptcy trusts. The Fund would be administered by a Fund Administrator working in the Department of Labor who would be appointed by the President with the advice and consent of the Senate.

Defendant Companies’ Payments. Defendant companies would be liable for payments not to exceed **\$90 billion** over the life of the Fund. Defendant companies’ obligations to the Fund are determined by a formula that takes into account companies’ past asbestos liabilities, the assets set aside for asbestos liability, and company revenues. This formula places defendant companies in tiers and subtiers of liability and sets payment obligations through the life of the Fund. The Fund Administrator would have the discretion to adjust payment obligations by defendants in cases of inequity or severe financial hardship, and any business meeting the Small Business Administration’s definition of a “small business” would be exempt from payments into the Fund.

Insurers’ Payments. Insurer participants would be liable for **\$46 billion** in total payments over the life of the Fund. The allocation of those payments among insurers would be determined by an Asbestos Insurers Commission composed of five commissioners appointed by the President with the advice and consent of the Senate. The insurers’ payments into the Fund are front-loaded so that almost \$12 billion is paid in the first three years.

Existing Bankruptcy Trusts. At least **\$4 billion** (and, by some estimates, as much as \$7.5 billion) would be transferred into the Fund from existing bankruptcy trusts dedicated to paying asbestos claims. These transfers would occur during the first six months of the Fund’s existence.

Borrowing Authority. The Fund Administrator would have the authority to borrow from commercial lending sources and the Federal Financing Bank, with defendant companies and insurer participants obligated to repay any amounts borrowed.

The Claims Process

S. 852 would create a no-fault claims process for individuals who have been exposed to asbestos and are presumed to have an asbestos-related injury due to that exposure. An individual who believed that he had been injured by asbestos would file a claim with the newly-created Office of Asbestos Disease Compensation within the Department of Labor. Unlike in the conventional tort system, the claimant will *not* need to establish the fault of any defendant in order to gain a right to compensation.

Instead, a claimant's eligibility for compensation would depend on three factors. *First*, the claimant must show sufficient exposure, both in terms of intensity and duration of exposure to asbestos. *Second*, the claimant must demonstrate sufficient latency (10 years) to indicate the possibility of asbestos-related injury. *Third*, the claim must include a doctor's diagnosis that asbestos exposure is a substantial contributing factor towards the injury.

Once eligibility has been established, the claimant will receive an award amount depending on the nature of his asbestos-related condition. The legislation identifies nine "condition or disease" categories — five malignant conditions (including mesothelioma and various cancers), and four nonmalignant conditions (including asbestosis and other pulmonary conditions). Title I, subtitle D, section 131, of the legislation spells out the award payments for each of these various conditions:

Level	Scheduled Condition or Disease	Scheduled Value
I	Asbestosis/Pleural Disease A	Medical Monitoring
II	Mixed Disease With Impairment	\$25,000
III	Asbestosis/Pleural Disease B	\$100,000
IV	Severe Asbestosis	\$400,000
V	Disabling Asbestosis	\$850,000
VI	Other Cancers	\$200,000
VII	Lung Cancer With Pleural Disease	smokers — \$300,000 ex-smokers — \$725,000 non-smokers — \$800,000
VIII	Lung Cancer With Asbestosis	smokers — \$600,000 ex-smokers — \$975,000 non-smokers — \$1,100,000
IX	Mesothelioma	\$1,100,000

Payments typically would be made over a period of three years and no longer than four years. Expedited payments would be made for exigent health claims by mesothelioma and other terminally ill victims, as well as for severe financial hardship cases. Level I claimants eligible for only medical monitoring will be reimbursed for reasonable costs (not covered by their personal insurance) for X-rays, physical examinations, and pulmonary function tests every three years. These tests will provide the claimant with information as to whether he or she has a compensable illness.

Protecting the Fund Against Insolvency

The legislation contains a number of mechanisms designed to ensure that the Fund has adequate monies to pay claims submitted to it. These mechanisms are of two types: protecting against fraud, and ensuring ample monies to pay awards. In general terms, the drafters believe that the bill will have adequate funds to meet all future obligations.

Fraud Protections. *First*, the Fund contains audit powers to protect against medical fraud and to ensure the accuracy of eligibility determinations. *Second*, it gives the Fund Administrator enforcement authority to address false, fraudulent, or fictitious statements in support of claims, including the power to impose liens and civil penalties. *Third*, it gives the Fund Administrator the power to exclude evidence and disqualify any attorney or medical professional who produces false or fraudulent information. *Fourth*, it authorizes an Institute of Medicine study to analyze the scientifically controversial causal link between asbestos exposure and certain cancers.

Funding Adequacy Protections. *First*, the legislation frontloads the contributions of insurers and requires early transfer of the current bankruptcy trust monies so that early demands on the Fund can be satisfied. (Asbestos claims are generally expected to decrease over time given latency periods and changes in industrial working conditions and asbestos use since the 1970s.) *Second*, it establishes a priority in bankruptcy and state insurance receivership proceedings for payment obligations to the Fund. *Third*, it grants the Fund Administrator the power to borrow and invest monies in the Fund. See pages 81-82 of the Committee Report, S. Rept. 109-97, for additional information on funding adequacy.

The Sunset Provision

If the protections above fail and the Fund becomes so substantially overburdened that it cannot pay the awards, the Fund will sunset. However, before the Fund can sunset, the Fund Administrator must conduct a thorough review of the Fund and determine whether changes to medical criteria and claim awards would salvage the Fund. The Administrator then makes recommendations to Congress as to changes that should be made. If the Fund does sunset, claimants would still have the ability to seek relief in federal district court, or in state court in the state in which the plaintiff resides or where the exposure took place.

The Asbestos Ban

Title V of this legislation amends Title II of the Toxic Substances Control Act to prohibit the manufacture, distribution, and importation of consumer products to which harmful asbestos is deliberately or knowingly added. An exception has been included for asbestos used for national security purposes.

Administration Position

At press time, the Administration has not issued a Statement of Administration Position on S. 852. However, the President repeatedly has called on Congress to pass asbestos litigation reform.²⁴

CBO Estimate

The Congressional Budget Office has analyzed the Fund's solvency and concluded:

The legislation is designed to produce collections totaling about \$140 billion over the first 30 years. CBO expects that the value of valid claims likely to be submitted to the fund over the next 50 years could be between \$120 billion and \$150 billion, not including possible financing (debt-service) costs and administrative expenses. The maximum actual revenues collected under the bill would be around \$140 billion, but could be significantly less. Consequently, the fund may have sufficient resources to pay all asbestos claims over the next 50 years, but depending on claim rates, borrowing, and other factors, its resources may be insufficient to pay all such claims.²⁵

CBO also "estimates that the bill would have little net effect on the budget over the first five years but would add about \$6.5 billion to deficits from 2011 through 2015."²⁶

Possible Managers' Amendment

The Judiciary Committee has explained that Senators Specter and Leahy are continuing work on a managers' amendment that would address, *in part*, the following issues:

- Start-up procedures, especially to address exigent claims and adequacy of funding.
- Leakage issues, to close loopholes that potentially could allow some cases to continue in the tort system.

²⁴ See, for example, Presidential Remarks to National Governors' Association, February 23, 2004, available at <http://www.whitehouse.gov/news/releases/2004/02/20040223-3.html>.

²⁵ Congressional Budget Office, Cost Estimate for S. 852, August 25, 2005, at 2, available at <http://www.cbo.gov/ftpdocs/68xx/doc6881/s852.pdf> (hereinafter "CBO Cost Estimate").

²⁶ CBO Cost Estimate, at 3.

- Jones Act loophole, to ensure that businesses are not forced to pay twice for the same injury.
- Medical criteria and fraud, to ensure that claimants' affidavits regarding length of occupational exposure are detailed and can be challenged by Fund Administrator in the event that fraud is suspected.
- Occupational exposure, to ensure that proximity requirements are clear.

Other Committee Views and Possible Amendments

Republican and Democrat members of the Judiciary Committee filed additional and dissenting views in the Committee Report, S. Rept. 109-97. Senators may wish to consult those views directly, but they are summarized briefly below. In addition, the Committee Report (at 79-89) contains a detailed discussion of critics' concerns and the Judiciary Committee's responses to those concerns. *Senators should be prepared for amendments that could address any of the concerns outlined below.*

Fund Solvency

Some Republican Senators on the Judiciary Committee have expressed concerns over whether the Fund will contain adequate funding to meet obligations.²⁷ The main source of this concern is uncertainty over the quantity of claims, especially in the categories where causation — i.e., whether asbestos actually caused the impairment or injury — is in serious question by medical science. As these Senators explain, “S. 852, as written, will result in many individuals receiving compensation who are not, in fact, sick from asbestos exposure.”²⁸

There are also solvency concerns rooted in the anticipated claim rates. To that point, as noted above, CBO estimates total claims between \$120 and \$150 billion. Another study by the firm of Bates White LLC, funded by critics of the Fund, concluded, “S. 852 is not financially viable. The Fund would create entitlements to pending and future claimants that substantially exceed the \$140 billion in receipts specified in S. 852.” Instead, Bates White concluded, “even under conservative assumptions, S. 852 would create entitlements valued at \$300 billion.”²⁹

The Judiciary Committee has stated in the Committee Report that S. 852's safeguards are sufficient to ensure that the Fund remains solvent, and that the stakeholders are committed to the long-term solvency of the Fund.³⁰ Of special note is the non-partisan CBO report concluding that the Fund liabilities would be between \$120 billion and \$150 billion. Also relevant is the

²⁷ See additional views of Senators Cornyn, Kyl, and Coburn in S. Rept. 109-97, at 138-139 and additional views of Senators Coburn, Grassley, Kyl, and Cornyn in S. Rept. 109-97, at 97-119.

²⁸ See additional views of Senators Coburn, Grassley, Kyl, and Cornyn in S. Rept. 109-97, at 99.

²⁹ Bates White LLC, “Analysis of S. 852 Fairness in Asbestos Injury Resolution (FAIR) Act,” September 2005, at 2-6, available at http://www.bateswhite.com/news/pdf/2005_Bates_FAIR_Act_Report.pdf.

³⁰ See S. Rept. 109-97, at 79-81.

ability of the Fund Administrator to invest the Fund's monies, thus growing the size of the Fund beyond the \$140 billion figure.³¹

Concerns about Implicit Taxpayer Guarantee of Fund

Some Republicans on the Judiciary Committee have argued that the entire concept of a "Fund" creates inherent risks to the American taxpayer. As an expression of this concern, the Concurrent Resolution on the Budget for FY 2005 included the following statement from the Senate Budget Committee:

Although the Committee recognizes the urgent need for litigation reform designed to expedite justice for legitimate victims of asbestos exposure and to halt the corrosive effect that litigation abuse has on the economy, it is concerned that the creation of a new uncapped government entitlement, during a period requiring austere budget discipline, would be imprudent and inconsistent with fiscal responsibility. The proposed use of mandatory contributions from defendant companies and insurers does not alleviate those concerns if the private contributions are capped at a finite level and the fund is not expected to meet the total liability of anticipated asbestos claims. The Committee does not believe it would be prudent to rely upon "sunset" provisions that would be triggered upon fund insolvency, thus returning potentially large numbers of unpaid claimants to the federal tort system. *Past experience with government administered trust funds designed to mandate a "no-fault" solution for liability claimants demonstrates that, even with specific legislative language to the contrary, there is a low probability of an actual return to the tort system. Political resistance to implementing such a reversion will likely be insurmountable. In essence, the Committee is concerned that under such a scenario there is a possibility that a massive taxpayer bail-out could occur if Congress is forced to step in and sustain the fund.*³²

In addition, the Government Accounting Office has issued a report examining the Black Lung Program, the Vaccine Injury Compensation Program (VICP), the Radiation Exposure Compensation Program (RECP), and the Energy Employees Occupational Illness Compensation Program (EEOICP).³³ The report concludes, "the federal role in all four programs has expanded significantly over time."³⁴ Some Republican Senators have cited these programs in arguing that the Fund is likely to lead to future taxpayer obligations.³⁵ Also, minority Senators who voted

³¹ See S. Rept. 109-97, at 79-89.

³² See Senate Budget Committee Report, *Concurrent Resolution on the Budget FY 2005*, at 25 (emphasis added).

³³ GAO, *Federal Compensation Programs: Perspectives on Four Programs*, GAO-06-230, November 2005, available at <http://www.gao.gov/new.items/d06230.pdf> (hereinafter "GAO Report").

³⁴ GAO Report, at 4.

³⁵ See additional views of Senators Kyl and Coburn in S. Rept. 109-97, at 147-151.

against the bill in committee have also raised concerns about the solvency of the Fund, and have made comparisons to the Black Lung Fund.³⁶

The Judiciary Committee discusses the differences between the Fund and the other federally-administered trusts at pages 86-88 of S. Rept. 109-97. They argue that this bill has far more safeguards than any of those other programs. For example, this bill has a comprehensive sunset provision.

Medical Criteria — Concerns About Improper Compensation

Some Republican Senators on the Judiciary Committee have argued that the medical criteria in the bill do not ensure that the Fund will pay only the claims of individuals who are truly sick from asbestos exposure. Instead, these Senators believe that the Fund will compensate claimants suffering from “other cancers” (Level VI) that “according to the overwhelming weight of the medical evidence, are not caused by exposure to asbestos.” Concerns are also expressed about the Level VII compensation category. These Senators argue that the inadequacy of the medical criteria will lead to financial burdens on the Fund that will lead to insolvency, but also that it is fundamentally improper for those not injured by asbestos to take compensation from those who are. Senator Coburn in particular has examined the science behind the medical criteria.³⁷

The Judiciary Committee points out that § 121(e) of the bill authorizes a study of these other cancers and their link to asbestos, and that the conclusions of the study are binding on the Fund Administrator. The committee also emphasizes that medical criteria should not be viewed in isolation, and that occupational exposure and latency are important factors that will prevent fraud.

CT Scan Use

Some Senators (especially Senator Coburn) have expressed concerns about S. 852’s use of CT scans to evaluate asbestos injuries given questions regarding their reliability and the potential for fraud. Part of the concern is that the CT scans could show pleural markers, but that the pleural markers do not actually indicate injury due to asbestos. The bill authorizes a study on the use of CT scans, but it is unclear if Senators’ immediate concerns have been satisfied.

“Leakage” Issues — Completeness of Exit from Tort System

Some Republican Senators have argued that the bill fails to shut down the tort system that has caused the problems the bill should address.³⁸ They argue, “rather than putting all claims pending at the time of enactment that do not have a final judgment or verdict into the trust fund, S. 852 leaves many current claims in court.” The Judiciary Committee has emphasized that provisions permitting reversion to the tort system if the Fund cannot be established in a

³⁶ See Minority Views of Senators Kennedy, Biden, Feingold, and Durbin in S. Rept. 109-97, at 192-200.

³⁷ See additional views of Senators Sessions, Cornyn, Grassley, Kyl, Graham, Brownback, and Coburn in S. Rept. 109-97, at 91-92, 94, and additional views of Senators Coburn, Grassley, Kyl, and Coburn in S. Rept. 109-97, at 97-119.

³⁸ See additional views of Senators Sessions, Cornyn, Grassley, Kyl, Graham, Brownback, and Coburn in S. Rept. 109-97, at 92-93.

reasonable time (9 months for exigent claims, 24 months for non-exigent claims) is an equitable response to a real, human need for compensation for injury and impairment.

These Senators have also expressed concerns about the future tort exposure if the Fund should sunset. The Judiciary Committee notes that, if claims someday revert to the tort system, the bill includes venue reform (to prevent forum-shopping) and applies federal *Daubert* standards (the Supreme Court’s case aimed at preventing junk science in federal courts) to state court proceedings.

Inadequate Protection Against Fraud

Some Republican Senators on the Judiciary Committee have praised the additional fraud-protection provisions in S. 852 (versus previous versions), but believe that the bill “does not go far enough.”³⁹ These Senators have argued that the medical screening provisions for Level I claimants remain an invitation to fraud. They also argue that the bill does not adequately address silica-related claims that have also been subject to fraudulent practices. For a discussion of how fraud has infected the asbestos litigation system, see additional views filed by Senators Kyl, Cornyn, and Coburn in S. Rept. 109-97, at 120-135.

Structure of Fund — “Allocation” Issues

Some Republican Senators on the Judiciary Committee have expressed concerns about how the obligations are allocated.⁴⁰ They have argued that companies with adequate insurance still may be forced to pay into the Fund. They also argue that there are inequities in the funding system (including problems with the hardship requirements) that could lead to inability to pay and eventual Fund insolvency. Some Judiciary Committee Democrats have also raised questions regarding “fairness among contributors,” arguing that “a handful of Fortune 500 corporations will save billions under the Trust Fund, while many small businesses and others with limited asbestos liability exposure will pay more than their fair share.”⁴¹ In fact, no small business, as defined by the Small Business Administration, will have any obligation to pay into the Fund.

Risks Associated with the Fund Administrator’s Borrowing Authority

Some Democrat and Republican Senators on the Judiciary Committee have separately expressed concerns about the borrowing authority given to the Fund Administrator. Some have suggested that there is a need to limit the number of years that this borrowing authority exists, or to cap the borrowing. Some Democrats have argued that such a heavy reliance on borrowing will result in a federal obligation.⁴²

Bankruptcy Trusts — § 524(g) Constitutional Issues

Some Republican Senators on the Judiciary Committee have expressed concerns about the bill’s provision that incorporates existing bankruptcy trusts into the Fund. The constitutional

³⁹ Id. at 93.

⁴⁰ See the additional views of Senators Sessions, Cornyn, Grassley, Kyl, Graham, Brownback, and Coburn in S. Rept. 109-97, at 94. In addition, examples of potential inequities are examined in the additional views of Senators Cornyn, Kyl, and Coburn in S. Rept. 109-97, at 140-141.

⁴¹ See Minority Views of Senators Kennedy, Biden, Feingold, and Durbin in S. Rept. 109-97, at 209-211.

⁴² Id. at 187-196, 211.

issue is addressed in a letter to Senator Cornyn by former Solicitor General Ted Olson, who argued that the bill would:

take resources belonging to victims of asbestos exposure and alter, often in material ways, their rights to recover for their injuries. In the event the bill is not modified — by allowing trusts to opt out of its coverage — the trustees we represent would seem to have no choice but to bring a lawsuit challenging these provisions as unconstitutional.⁴³

However, the Judiciary Committee notes that former Solicitor General Seth Waxman, along with Harvard Law Professor Laurence Tribe, both have said that there is no Takings violation here.⁴⁴ These Republican Senators have asked for a “full explanation as to the likely impact of these funds becoming unavailable” due to constitutional challenges.⁴⁵ For additional concerns about § 524(g) trusts and the asbestos bill, see additional views of Senators Cornyn, Kyl, and Coburn in S. Rept. 109-97, at 144-146.

The Judiciary Committee has noted that the existing § 524(g) trusts (and similar judicially-created trusts) are, today, largely managed by the trial bar, and that many people who are not impaired by asbestos are currently receiving compensation. It further notes that provisions exist in the bill to ensure that, if these challenges prevent the transfer of these monies, then additional contributions will be made by stakeholders. Finally, at least one bankruptcy trust valued at \$1.6 billion has already stated that it will forego any challenges.

Concerns about Department of Labor Involvement

Some Republican Senators on the Judiciary Committee have criticized the fact that the bill creates a federally administered program located within the Department of Labor. They argue that “housing the asbestos trust fund within the Department of Labor will lead to inefficient processing of claims and will create an expectation that the federal government guarantees the solvency of the fund.” These Senators advocate making the Fund a “private, non-profit corporation.”⁴⁶

Concerns about Double-Dipping (Subrogation of Workers Compensation Awards)

Some academic critics have expressed concerns that the bill allows claimants to receive compensation for the same injury twice, i.e., through the workers compensation system and then through the Fund.⁴⁷ Instead, the bill does not subrogate those claims. One estimate puts the cost

⁴³ See letter cited in the additional views of Senators Cornyn, Kyl, and Coburn in S. Rept. 109-97, at 142.

⁴⁴ S. Rept. 109-97, at 85-86 and accompanying testimony cited therein.

⁴⁵ See additional views of Senators Cornyn, Kyl, and Coburn in S. Rept. 109-97, at 142.

⁴⁶ See additional views of Senators Sessions, Cornyn, Grassley, Kyl, Graham, Brownback, and Coburn in S. Rept. 109-97, at 94-95. Senators Brownback and Coburn also discuss this issue at length in the additional views of Senators Brownback and Coburn in S. Rept. 109-97, at 154-157.

⁴⁷ See Lester Brickman, *An Analysis of the Financial Impact of S. 852, the Fairness in Asbestos Injury Resolution Act*, 27 Cardozo L. Rev. at xxvii (2005).

of this provision at \$20-40 billion.⁴⁸ The drafters of the legislation have stated that the no-subrogation rule is a matter of fundamental fairness to victims.

Libby, Montana — Arbitrariness and Occupational Exposure

The bill contains special provisions relating to the asbestos exposure of residents of Libby, Montana. No occupational exposure is required, and claim amounts may, in some cases, be higher than for similarly injured persons in other parts of the country. (See Title I, Subtitle D.) Republican and Democrat Senators have expressed concerns regarding the treatment of Libby claimants. Senator Graham offered an amendment in Committee to extend the special rules for Libby to include other “processing” sites, and some Democrats have raised questions about the fairness as well.⁴⁹

The Judiciary Committee states that the Libby claimants are specially situated because of the nature and extent of asbestos exposure, and that other sites that focus on processing alone could not have created the same kind of community-wide exposure that the Libby strip mine created.

Attorney Fee Cap

Some Democrat Senators on the Judiciary Committee have objected to what they call the “severe cap” on attorney fees in the bill, i.e., 5 percent.⁵⁰ The Judiciary Committee argues that this cap is a reasonable compromise given that the claims process is no-fault and will not require adversarial lawyering. In fact, others have argued that the 5 percent cap is *too high*, and that the attorney fee provision should be modified to take into account the actual hours worked.

Minority Concerns about Lung Cancer Changes

Some Democrat Senators on the Judiciary Committee have objected to the medical criteria in S. 852 as compared to legislation passed out of the Judiciary Committee (without those Senators’ votes) in the 108th Congress, in particular the treatment of certain lung cancer sufferers. In particular, these Senators believe that “the clear weight of the evidence supports the conclusion that asbestos can be a substantial contributing factor to lung cancer in persons who were exposed to high levels of asbestos over long periods of time, even if they do not also have visible markings from nonmalignant asbestos disease on their lungs.”⁵¹ The substantive claims by these Senators are addressed in the Committee Report, and especially in the additional views of Senators Coburn, Grassley, Kyl, and Cornyn, in S. Rept. 109-97, at 97-119. Senator Kennedy offered three amendments in the Judiciary Committee designed to allow these individuals to seek compensation for asbestos-related injuries; all were defeated.

Minority Concerns about Medical Criteria Standard of Proof

Some Democrat Senators on the Judiciary Committee object to the requirement that asbestos be a “substantial contributing factor” rather than just a “contributing factor” towards an asbestos-related injury. They argue that claimants should not have to clear this additional

⁴⁸ Id. at xlii.

⁴⁹ See Minority Views of Senators Kennedy, Biden, Feingold, and Durbin in S. Rept. 109-97, at 208-209.

⁵⁰ Id. at 216-217.

⁵¹ Id. at 201-205.

hurdle.⁵² On the other hand, the Judiciary Committee believes that this requirement will help protect against fraudulent claims and focus compensation on those most likely to have been injured by asbestos. Senator Kennedy offered an amendment in the Judiciary Committee to lower the standard of proof to “contributing factor;” it was defeated.

Minority Concerns about Medical Criteria Generally

Some Democrat Senators on the Judiciary Committee generally argue that the medical criteria of S. 852 should be broadened to include more individuals who have been exposed to asbestos, and to individuals who have been exposed for shorter periods of time.⁵³ These concerns appear to be grounded in a disagreement over the science of asbestos injury causation.

Minority Concerns about Sunset Provision

Some Democrat Senators on the Judiciary Committee object to provisions in S. 852 that allow the Fund Administrator to recommend to Congress that it adjust award levels or medical criteria in order to ensure ongoing solvency or if the science suggests that adjustments are necessary.⁵⁴ Senator Biden offered an amendment in the Judiciary Committee to deprive the Fund Administrator of this authority; the amendment was defeated.

Minority Concerns about Adequacy of Claims Values

Some Democrat Senators on the Judiciary Committee have argued that S. 852 does not provide adequate compensation to victims. In part, this claim is based on a belief that “the victims in many cases will receive less than they would get in court today.”⁵⁵ However, this claim (which is not accompanied by citation to any study) does not take into account all the claimants that receive pennies on the dollar due to bankruptcies or dilutions of compensation caused by classes populated by unimpaired claimants or by fraudulent claims.

Minority Concerns about Application of the Collateral Source Rule

Some Democrat Senators on the Judiciary Committee object to the Fund’s requirement that any payment from the Fund be reduced by the gross compensation the claimant received from previous court proceedings or settlements relating to asbestos proceedings.⁵⁶ Senator Durbin offered an amendment in the Judiciary Committee to ensure that only the *net* compensation is held against the Fund claim; the amendment was defeated.

Minority Concerns about Treatment of Pending and Settled Cases

Some Democrat Senators on the Judiciary Committee object that claimants should be able to continue their cases in court rather than wait for the Fund to be set up. Also, these Senators object to the treatment of recent settlements still awaiting court approval when the bill

⁵² Id. at 205-207.

⁵³ Id. at 200, 208.

⁵⁴ Id. at 213-214.

⁵⁵ Id. at 215-216.

⁵⁶ Id. at 217.

s enacted.⁵⁷ Senator Biden offered amendments in the Judiciary Committee to address both issues; they were defeated.

Minority Concerns about Delays and Related Constitutional Challenges

Some Democrats on the Judiciary Committee expressed concerns that constitutional challenges will delay the set-up of the Fund. They note that, while the Fund borrows the McCain-Feingold procedures for managing a constitutional challenge, the challenges to that law still took 20 months.⁵⁸ Senator Biden offered an amendment in the Judiciary Committee to return these cases to the court system in the event of a judicial stay of this law; the amendment was defeated.

Additional Possible Votes and Amendments

Budget Points of Order

The bill *may* be subject to one or more budget points of order. Sixty votes are necessary to waive a budget point of order.

One potential budget point of order relates to section 302(f), which provides that a committee cannot spend beyond the amount allocated to it. Budget Committee Chairman Gregg has the ability to prevent this point of order from being raised.

Another potential budget point of order relates to section 407, which provides for a budget point of order for any spending greater than \$5 billion in any ten year period in the future. Any Senator can make this point of order.

The Judiciary Committee believes that, while these points of order technically may lie against the bill, they should not apply because of the nature of this legislation. The committee explains that these points of order exist only because the CBO has treated the Fund expenditures as government spending, whereas the committee believes that the funding should be viewed as the transfer of private contributions from businesses to claimants.

Non-Germane Amendments

Because the bill is open to all amendments in a pre-cloture environment, Senate Democrats could seek to use the bill as an opportunity to generate votes on lobbying reform, Medicare, veteran funding, minimum wage, and any number of other items. The non-tax amendments that Democrats filed during consideration of Tax Reconciliation bill, H.R. 4297, could also be offered.

⁵⁷ Id. at 217-221.

⁵⁸ See Minority Views of Senators Kennedy, Biden, Feingold, and Durbin in S. Rept. 109-97, at 222-225.